Supreme Court, U.S.
FILED
FEB 21 1991
OFFICE OF THE CLERK

No. 90-5744

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD L. CHAPMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

55pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether, in determining the weight of LSD for sentencing purposes, the district court correctly considered the combined weight of the LSD and the blotter paper used as a carrier medium for the drug.

2. Whether the Constitution bars Congress or the Sentencing Commission from requiring courts, in sentencing defendants for LSD offenses, to consider the combined weight of the LSD and the blotter paper that is used as a carrier medium for the drug.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional, statutory, and sentencing guidelines provisions involved	1
Statement	2
Summary of argument	8
Argument:	
I. The Anti-Drug Abuse Act of 1986 and the Sentencing Guidelines require that the combined weight of the LSD and its carrier medium be used in calculating the total weight of the drug for sentencing purposes	10
A. Sentences for LSD offenses are based on the gross weight of the drug and its carrier medium, not the net weight of the pure drug	11
B. LSD-infused blotter paper constitutes "a mixture or substance containing a detectable amount" of LSD	18
C. Neither the rule of lenity nor the canon of construing laws to avoid unconstitutionality applies in this case	22
II. Congress acted rationally in including the weight of LSD carrier mediums for sentencing purposes	29
A. A convicted defendant does not have a "fundamental right" to have the courts at sentencing reassess the appropriate penalty for his crime	29
B. Including the weight of an LSD carrier medium does not violate the Due Process Clause by making the defendant's sentence hinge on an arbitrary factor	31
C. Including the weight of an LSD carrier medium as part of the statutory "mixture or substance" does not render the statute unconstitutionally vague	37
Conclusion	39

Page

Appendix A 1a

Appendix B 5a

TABLE OF AUTHORITIES

Cases:

Bell v. *Wolfish*, 441 U.S. 520 (1979) 30
Bellavia v. *Fogg*, 613 F.2d 369 (2d Cir. 1979) 5a
Bolling v. *Sharpe*, 347 U.S. 497 (1954) 31
Callanan v. *United States*, 364 U.S. 587 (1961) 22
Carmona v. *Ward*, 576 F.2d 405 (2d Cir. 1978), cert. denied, 439 U.S. 1091 (1979) 5a
Church of the Holy Trinity v. *United States*, 143 U.S. 457 (1892) 26
City of Dallas v. *Stanglin*, 490 U.S. 19 (1989) 36
Crowell v. *Benson*, 285 U.S. 22 (1932) 29
Dandridge v. *Williams*, 397 U.S. 471 (1970) 36
Dobbert v. *Florida*, 432 U.S. 282 (1977) 30
Finley v. *California*, 222 U.S. 28 (1911) 30
Garrett v. *United States*, 471 U.S. 773 (1985) 32
Hoffman Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 38
Huddleston v. *United States*, 415 U.S. 814 (1974) 22
Hutto v. *Davis*, 454 U.S. 370 (1982) 30
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 25
Jones v. *United States*, 463 U.S. 354 (1983) 31
Leary v. *United States*, 395 U.S. 6 (1969) 30
Lockett v. *Ohio*, 438 U.S. 586 (1978) 35
Marshall v. *United States*, 414 U.S. 417 (1974) 30
McGinnis v. *Royster*, 410 U.S. 263 (1973) 30
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 30
Meachum v. *Fano*, 427 U.S. 215 (1976) 30
Mistretta v. *United States*, 488 U.S. 361 (1989) 35
Moskal v. *United States*, 111 S. Ct. 461 (1990) 18, 22, 23
Osborne v. *Ohio*, 110 S. Ct. 1691 (1990) 35
Pierce v. *Underwood*, 487 U.S. 552 (1988) 25
Quern v. *Mandley*, 436 U.S. 725 (1978) 25
Russello v. *United States*, 464 U.S. 16 (1983) 18, 22, 27
Salazar v. *Estelle*, 547 F.2d 1226 (5th Cir. 1977) 5a

Cases—Continued:

Page

Smith v. *United States*, 284 F.2d 789 (5th Cir. 1960) 36
Sorrells v. *United States*, 287 U.S. 435 (1932) 23
Stanford v. *Kentucky*, 109 S. Ct. 2969 (1989) 30
Sullivan v. *Finkelstein*, 110 S. Ct. 2658 (1990) 25
Swain v. *Pressley*, 430 U.S. 372 (1977) 29
Terrebonne v. *Butler*, 848 F.2d 500 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989) 6a
Tot v. *United States*, 319 U.S. 463 (1943) 30
Turner v. *United States*, 396 U.S. 398 (1970) 30
United States, Ex parte, 242 U.S. 27 (1916) 35
United States v. *Aiello*, 864 F.2d 257 (2d Cir. 1988) 6a
United States v. *Albertini*, 472 U.S. 675 (1985) 29
United States v. *Amend*, 791 F.2d 1120 (4th Cir.), cert. denied, 479 U.S. 930 (1986) 5a
United States v. *Baker*, 883 F.2d 13 (5th Cir.), cert. denied, 110 S. Ct. 517 (1989) 18
United States v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) 6a
United States v. *Bass*, 404 U.S. 336 (1971) 22
United States v. *Batchelder*, 442 U.S. 114 (1979) 29
United States v. *Bayerle*, 898 F.2d 28 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990) 18
United States v. *Beissel*, 901 F.2d 1467 (8th Cir. 1990) 28
United States v. *Bishop*:
894 F.2d 981 (8th Cir. 1990) 4, 11, 15, 18, 19, 20, 24, 31
704 F. Supp. 910 (N.D. Iowa 1989) 4, 19, 20, 24
United States v. *Buggs*, 904 F.2d 1070 (7th Cir. 1990) 27
United States v. *Butler*, 895 F.2d 1016 (5th Cir. 1989), cert. denied, 111 S. Ct. 82 (1990) 18
United States v. *Daly*, 883 F.2d 313 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990) 4, 11, 19, 20
United States v. *Darby*, 744 F.2d 1508 (11th Cir. 1984), cert. denied, 471 U.S. 1100 (1985) 5a
United States v. *Dorsey*, Nos. 90-1214 *et al.* (8th Cir. Dec. 24, 1990) 17

Cases—Continued: Page

United States v. *Dorsey*, 591 F.2d 922 (D.C. Cir. 1979) 27
United States v. *Elrod*, 898 F.2d 60 (6th Cir.), cert. denied, 111 S. Ct. 104 (1990) 4, 11, 18, 20
United States v. *Erwin*, 793 F.2d 656 (5th Cir.), cert. denied, 479 U.S. 991 (1986) 6a
United States v. *Fiore*, 467 F.2d 86 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973) 5a
United States v. *Fisher*, 6 U.S. (2 Cranch) 358 (1805) 22
United States v. *Gallo*, 763 F.2d 1504 (6th Cir. 1985) 6a
United States v. *Garrett*, 727 F.2d 1003 (11th Cir. 1984), aff'd, 471 U.S. 773 (1985) 5a
United States v. *Grayson*, 438 U.S. 41 (1978) 35
United States v. *Harrington*, 761 F.2d 1482 (11th Cir. 1985) 5a
United States v. *Harriss*, 347 U.S. 612 (1954) 38
United States v. *Healy*, 729 F. Supp. 140 (D.D.C. 1990), appeal pending (D.C. Cir.) 4, 11, 23
United States v. *Holmes*, 838 F.2d 1175 (11th Cir.), cert. denied, 486 U.S. 1058 (1988) 31-32
United States v. *Hoyt*, 879 F.2d 505 (9th Cir. 1989) 32
United States v. *Iguaran-Palmar*, No. 89-2143 (1st Cir. Feb. 4, 1991) 33
United States v. *Klein*, 860 F.2d 1489 (9th Cir. 1988) 32
United States v. *Larsen*, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509 ..... 4, 11
United States v. *Marshall*, 706 F. Supp. 650 (C.D. Ill. 1989), aff'd, 908 F.2d 1312 (7th Cir. 1990), cert. granted *sub nom. Chapman* v. *United States*, No. 90-5744 ..... 4, 20, 38
United States v. *Martorano*, 866 F.2d 62 (3d Cir. 1989), cert. denied, 110 S. Ct. 1128 (1990) 6a
United States v. *Mazurie*, 419 U.S. 544 (1975) 37
United States v. *McCann*, 835 F.2d 1184 (6th Cir. 1987), cert. denied, 486 U.S. 1026 (1988) 6a
United States v. *McGeehan*, 824 F.2d 677 (8th Cir. 1987), cert. denied, 484 U.S. 1061 (1988) 13, 15, 38

Cases—Continued: Page

United States v. *McKeever*, 906 F.2d 129 (5th Cir. 1990), cert. denied, No. 90-5917 (Jan. 22, 1991) 17
United States v. *Meitinger*, 901 F.2d 27 (4th Cir.), cert. denied, 111 S. Ct. 519 (1990) 17-18
United States v. *Mendes*, 912 F.2d 434 (10th Cir. 1990) 28, 31
United States v. *Mendoza*, 876 F.2d 639 (8th Cir. 1989) 31
United States v. *Milburn*, 836 F.2d 419 (8th Cir.), cert. denied, 487 U.S. 1222 (1988) 6a
United States v. *Monsanto*, 109 S. Ct. 2657 (1989) 21, 28
United States v. *Monu*, 782 F.2d 1209 (4th Cir. 1986) 28
United States v. *Mueller*, 902 F.2d 336 (5th Cir. 1990) 17
United States v. *Murphy*, 899 F.2d 714 (8th Cir. 1990) 31
United States v. *Ortiz*, 742 F.2d 712 (2d Cir.), cert. denied, 469 U.S. 1075 (1984) 5a
United States v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) 5a
United States v. *Pinto*, 875 F.2d 143 (7th Cir. 1989) 35
United States v. *Powell*, 423 U.S. 87 (1985) 37
United States v. *Ramos*, 861 F.2d 228 (9th Cir. 1988) 32
United States v. *Rhodes*, 779 F.2d 1019 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986) 5a
United States v. *Rodgers*, 466 U.S. 475 (1984) 22-23, 39
United States v. *Rojas*, 868 F.2d 1409 (5th Cir. 1989) 18
United States v. *Rose*, 881 F.2d 386 (7th Cir. 1989) 4, 11, 20
United States v. *Rumely*, 345 U.S. 41 (1953) 29
United States v. *Salerno*, 481 U.S. 739 (1987) 30, 35
United States v. *Savinovich*, 845 F.2d 834 (9th Cir.), cert. denied, 488 U.S. 943 (1988) 32
United States v. *Skelton*, 901 F.2d 1204 (4th Cir. 1990) 17

Cases—Continued: Page

United States v. *Smith*, 601 F.2d 972 (8th Cir.), cert. denied, 444 U.S. 899 (1979) 27
United States v. *Smith*, 602 F.2d 834 (8th Cir.), cert. denied, 444 U.S. 902 (1979) 36
United States v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975) 6a
United States v. *Stewart*, 820 F.2d 1107 (9th Cir. 1987) 6a
United States v. *Taylor*, 868 F.2d 125 (5th Cir. 1989) 11
United States v. *Thomas*, 757 F.2d 1359 (2d Cir. 1985) 6a
United States v. *Touby*, 909 F.2d 759 (3d Cir. 1990), cert. granted, No. 90-6282 17
United States v. *Turkette*, 452 U.S. 576 (1981) 22
United States v. *Valenzuela*, 646 F.2d 352 (9th Cir. 1980) 6a
United States v. *Webster*, 639 F.2d 174 (4th Cir.), cert. denied, 454 U.S. 857 (1981) 5a-6a
United States v. *Williams*, 894 F.2d 208 (6th Cir. 1990) 28
Williams v. *United States*, 731 F.2d 138 (2d Cir. 1984), cert. denied, 469 U.S. 1188 (1985) 6a
Young v. *Miller*, 883 F.2d 1276 (6th Cir. 1989), petition for cert. pending, No. 89-6960 ..... 6a

Constitution, statutes, and rules:

U.S. Const.:
Amend. I 35, 37
Amend. V (Due Process Clause) 30, 31, 37, 1a
Amend. VIII (Cruel and Unusual Punishment Clause) 30, 1a
Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 ..... 11, 13
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2068 13
Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Tit. II, 84 Stat. 1260-1261 12-13
Sentencing Reform Act:
18 U.S.C. 3553(b) 36
18 U.S.C. 3553(e) 6, 37

Statutes and rules—Continued: Page

18 U.S.C. 1111 35
18 U.S.C. 2114 (1982) 35
21 U.S.C. 812 ..... 3, 10
21 U.S.C. 841 ..... 23, 37, 1a
21 U.S.C. 841(a) 10, 1a
21 U.S.C. 841(a)(1) 2, 5
21 U.S.C. 841(b)(1) (Supp. II 1984) 15
21 U.S.C. 841(b)(1) 10, 25
21 U.S.C. 841(b)(1)-(3) (1982) 13
21 U.S.C. 841(b)(1)(A)(i)-(viii) 14
21 U.S.C. 841(b)(1)(A)(iv) (Supp. II 1984) 13
21 U.S.C. 841(b)(1)(A)(iv) 12
21 U.S.C. 841(b)(1)(A)(v) 10
21 U.S.C. 841(b)(1)(B) (1982) 13
21 U.S.C. 841(b)(1)(B) (Supp. II 1984) 13
21 U.S.C. 841(b)(1)(B) 5
21 U.S.C. 841(b)(1)(B)(i)-(viii) 14
21 U.S.C. 841(b)(1)(B)(iv) 12
21 U.S.C. 841(b)(1)(B)(v) 5, 6, 10
21 U.S.C. 841(b)(1)(B)(viii) 12
21 U.S.C. 841(b)(1)(C) 10
21 U.S.C. 846 2
21 U.S.C. 848 ..... 32, 5a
21 U.S.C. 848(b) 35
United States Sentencing Comm'n, *Guidelines Manual* (1987):
§ 2D1.1(a)(3) Drug Quantity Table 16
§ 5.2 Sentencing Table 38
United States Sentencing Comm'n, *Guidelines Manual* (1990):
§ 2D1.1 ..... 5, 16
Drug Quantity Table 5, 16
Application Note 9 ..... 2a
Application Note 10 16
Application Note 11 ..... 3a
§ 2D1.1(c) 15
§ 3B1.1(a)-(c) 33
§ 3B1.1(c) 38
§ 4B1.1 33
§ 4B1.3 33

Statutes and rules—Continued: Page

§ 5K1.1 ..... 6, 37
§ 5K1.1 (Policy Statement) 37
§ 5K2.0 (Policy Statement) 36

Miscellaneous:

135 Cong. Rec.:
p. S12,748 (daily ed. Oct. 5, 1989) 24
pp. S13,433-S13,469 (daily ed. Oct. 16, 1989) .. 24
136 Cong. Rec. S7069-S7070 (daily ed. May 24, 1990) 25
T. Cox *et al., Drugs and Drug Abuse: A Reference Text* (1983) 3, 20
54 Fed. Reg. 9136 (1989) 24
A. Goodman *et al., Goodman and Gilman's The Pharmacological Basis of Therapeutics* (7th ed. 1985) 3
H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1 (1970) 13
H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. 1 (1986) 14, 21, 31
A. Hoffmann, *LSD: My Problem Child* (1983) 3
Office of Intelligence, DEA, *Domestic Monitor Program* (Apr.-June 1990) 28
J. Platt, *Heroin Addiction: Theory, Research, and Treatment* (2d ed. 1986) 27
Questions Most Frequently Asked About the Sentencing Guidelines, reprinted in T. Hutchison & D. Yellen, *Federal Sentencing Law and Practice*, Supp. App. 4 (1989) 26
S. 1630, 97th Cong., 1st Sess. (1981) 14
S. 1711, 101st Cong., 1st Sess. (1989) 24
S. Rep. No. 613, 91st Cong., 1st Sess. (1969) 13
S. Rep. No. 307, 97th Cong., 1st Sess. (1981) 14, 15
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 13, 15
United States Sentencing Comm'n, *Guidelines Manual* (1990) 3, 15-16, 17, 33
Webster's Third New International Dictionary (1986) 18
B. Wells, *Psychedelic Drugs* (1973) 20

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-5744

RICHARD L. CHAPMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 38-87) is reported at 908 F.2d 1312. The opinion of the district court (J.A. 13-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1990. J.A. 88-89. The petition for a writ of certiorari was filed on September 17, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Pertinent constitutional, statutory, and Sentencing Guidelines provisions are reprinted in Appendix A to this brief.

STATEMENT

Following a joint jury trial in the United States District Court for the Western District of Wisconsin, petitioners were convicted of distributing lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841(a)(1). Petitioner Chapman was sentenced to 96 months' imprisonment; Schoenecker was sentenced to 63 months' imprisonment; and Brumm was sentenced to 60 months' imprisonment. J.A. 20, 26, 32. The en banc court of appeals consolidated their case with that of respondent Marshall. Marshall was convicted of distributing ten or more grams of a mixture or substance containing a detectable amount of LSD, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to 240 months' imprisonment.[1] The en banc court of appeals affirmed the judgment in both cases.

1. LSD is a hallucinogenic or psychedelic drug. When the effects of LSD were discovered in 1943, scientists believed that the drug might help them understand mental illness, but it soon became evident that the dangers of the drug far outweighed any scientific value it might have, and LSD was universally outlawed.

LSD is an extremely powerful drug. It is more than 100 times as potent as psilocybin and psilocin, other hallucinogenic drugs, and from 4,000 to 10,000

[1] Marshall was convicted of distributing 11,751 doses of LSD. Marshall has filed a separate certiorari petition (No. 90-929) seeking review of the judgment below, but he is also a respondent in this case, pursuant to this Court's Rule 12.4, and he has filed a separate brief as respondent supporting petitioners. For the sake of clarity and convenience, we will use the terms "Chapman" and "Marshall" to refer to the two cases and the two briefs.

times as potent as mescaline, a naturally occurring substance with hallucinogenic properties. LSD is also highly dangerous. Under some conditions, LSD can induce confusion, disorientation, illusions, hallucinations, delusions, paranoid ideations, and other alterations of mood and thinking.[2] Today, LSD has no legitimate medical use, and it is listed under the federal drug laws as a Schedule I Controlled Substance. 21 U.S.C. 812. See Tr. 66-67.[3]

LSD is bought and sold by the dose, not by its weight.[4] Tr. 30. According to the Sentencing Commission, the average dose of LSD is 0.05 milligrams, which means that a gram of the pure drug can produce 20,000 doses. United States Sentencing Comm'n, *Guidelines Manual* 2.53 (1990). Since a single dose of LSD is almost infinitesimal, the drug is typically distributed through a carrier medium, such as perforated "blotter" paper or gelatin. The LSD is dissolved in a solvent, such as alcohol or water, and it is then sprayed or dropped with a pipette onto the paper or gelatin; alternatively, the blotter paper is dipped

[2] Those effects sometimes manifest themselves in psychotic states, bizarre or violent behavior, or attempts at suicide. In most cases the psychosis clears within hours or days, but in some cases it can persist for months. T. Cox *et al., Drugs and Drug Abuse: A Reference Text* 86-89, 95-97, 307-315 (1983); A. Goodman *et al., Goodman and Gilman's The Pharmacological Basis of Therapeutics* 562-565 (7th ed. 1985); A. Hoffmann, *LSD: My Problem Child* 45, 67-70 (1983).

[3] "Tr." refers to the trial transcript in the case of respondent Marshall. That record was before the court of appeals, because the court consolidated Marshall's case with Chapman's.

[4] In forensic chemistry, the term "dose" or "dosage unit" refers to a tablet, a capsule, or a piece of paper that is used to distribute a drug. Tr. 40.

into the solution. After the solvent evaporates, the blotter paper or gelatin can be sold as a unit or cut into small one-dose squares. Users can swallow the entire square; they can drop it into a beverage that releases the drug; or they can lick the LSD off the paper. J.A. 39-40; Tr. 8-10, 30-35, 38-40, 48-50, 68-69.[5]

2. On April 17, 1989, undercover police officer Dan Roman of the Madison, Wisconsin, Police Department spoke with petitioner Chapman over the telephone to discuss the purchase of LSD. Chapman told Officer Roman that he could supply 20 sheets or approximately 2,000 doses of LSD, but that his source was out of town. Chapman and the officers agreed to meet at a local bar two nights later in order to complete the sale. When they met that evening, Chapman told Officer Roman that he could supply the officer only 1,000 doses of LSD and that the price would be $1,750. Chapman and Roman agreed to make the exchange one hour later. Chapman then left the bar and met with petitioners Schoenecker and Brumm. Schoenecker later accompanied Chapman to the bar, where Chapman sold the LSD to Officer Roman. The

[5] For other descriptions of how LSD is prepared, distributed, and ingested, see *United States* v. *Larsen*, 904 F.2d 562, 563 (10th Cir. 1990), petition for cert. pending, No. 90-5509; *United States* v. *Elrod*, 898 F.2d 60, 61 (6th Cir.), cert. denied, 111 S. Ct. 104 (1990); *United States* v. *Bishop*, 894 F.2d 981, 985-987 (8th Cir. 1990), aff'g 704 F. Supp. 910, 911 (N.D. Iowa 1989); *United States* v. *Daly*, 883 F.2d 313, 317-318 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); *United States* v. *Rose*, 881 F.2d 386, 388 (7th Cir. 1989); *United States* v. *Healy*, 729 F. Supp. 140, 141 (D.D.C. 1990), appeal pending (D.C. Cir.); *United States* v. *Marshall*, 706 F. Supp. 650, 651-652 (C.D. Ill. 1989), aff'd, 908 F.2d 1312 (7th Cir. 1990) (en banc) (decision below), cert. granted *sub nom. Chapman* v. *United States*, No. 90-5744.

defendants were arrested minutes later. At the time of their arrests, Schoenecker and Brumm had with them the pre-recorded bills that Officer Roman had used to purchase the LSD. J.A. 4-8.

3. Chapman, Schoenecker, and Brumm were charged with distributing approximately five grams of LSD, in violation of 21 U.S.C. 841(a)(1). J.A. 9. All three pleaded guilty. With respect to sentencing, they argued that under the statute and the Sentencing Guidelines their sentences should be calculated on the basis of the weight of the LSD alone, without including the weight of the blotter paper that was used as a carrier medium for the drug.

The district court rejected their argument. The court noted that both the Sentencing Guidelines and the statute set the penalties for LSD offenses according to the weight of any "mixture or substance containing a detectable amount" of LSD. See 21 U.S.C. 841(b)(1)(B); Sentencing Guidelines § 2D1.1, Drug Quantity Table n.*. The court concluded that the LSD-infused blotter paper that Chapman sold to Officer Roman was a "mixture or substance" containing the LSD. Therefore, the court held, the 5.7 gram weight of the blotter paper and the drug should be used as the basis for sentencing, rather than the weight of the pure drug, which the government stipulated was less than one gram. See J.A. 8, 12, 13. Because the LSD-infused blotter paper weighed more than one gram, the court held that 21 U.S.C. 841(b)(1)(B)(v) required that the defendants be sentenced to at least five years' imprisonment. And because the drug-infused blotter paper weighed more than four but less than seven grams, the court held that petitioners' base offense level under the Sentencing Guidelines was 28. J.A. 13-17. See Guidelines § 2D1.1, Drug Quantity Table.

The district court held that Congress and the Sentencing Commission had not acted irrationally in setting the penalties for LSD offenses on the basis of the combined weight of the carrier medium and the drug. J.A. 15-16. "Presumably," the court wrote, Congress "wanted to impose heavy penalties on the transportable form of the drug, since it was in that form that [LSD] posed the greatest danger. It was not irrational for Congress to make that choice or, having made it, to decline to provide separate penalties for every possible medium in which the drug might be distributed." J.A. 16. The court also rejected the defendants' argument that LSD should be treated differently from other drugs because of the way that LSD is distributed. Cocaine, the court explained, is rarely sold in pure form; it is frequently mixed with some cutting agent. Yet "[u]nder both the statute and the sentencing guidelines, persons who sell 500 grams of heavily cut cocaine can be subjected to the same penalties as persons who sell 500 grams of pure cocaine." *Ibid.*

The government moved pursuant to Sentencing Guidelines § 5K1.1 for a downward departure below the indicated Guidelines range because the defendants had provided substantial cooperation in the government's investigation. The government declined, however, to file a motion under 18 U.S.C. 3553(e), which would have allowed the court to reduce the defendants' sentences below the mandatory minimum five-year sentence set by 21 U.S.C. 841(b)(1)(B)(v). The court then sentenced petitioners to terms of imprisonment that were below the Sentencing Guidelines range, but at or above the statutory mandatory minimum.

4. A divided court of appeals, sitting en banc, affirmed petitioners' sentences. J.A. 38-87. The court

noted that both the federal drug statutes and the Sentencing Guidelines provide an escalating range of punishments for drug offenses based on the weight of any "mixture or substance containing a detectable amount" of a controlled substance. In light of that language, the court found that "[i]t is not possible to construe the words of § 841 to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug." J.A. 43. Thus, in accord with the conclusion reached by other courts of appeals, the court held that an LSD carrier medium, such as blotter paper, constitutes a "mixture or substance containing a detectable amount" of the drug and must be included in calculating the drug's weight. J.A. 44-48.

The court of appeals also concluded that this scheme was rational, and therefore constitutional, for several reasons. J.A. 50-62. First, the court noted that the use of blotter paper makes LSD easier to transport, conceal, and sell. The paper therefore plays an important role in facilitating the distribution of the drug. Second, the court held that because blotter paper was the carrier medium used in virtually all cases involving LSD, it was rational for the statutes and the Sentencing Guidelines to address "the main cases rather than the exceptions." J.A. 60. Third, the court concluded that it was reasonable for Congress to include the weight of the blotter paper in calculating the weight of the drug, since it would be costly and technologically difficult to extract and accurately weigh the amount of LSD contained in the blotter paper. *Ibid.* Finally, the court noted, petitioners selected the lightest and most common carrier medium available for distributing their LSD; they were therefore "in no position to complain" that the

statute or the Sentencing Guidelines were unconstitutional as applied to them. J.A. 61.

Five judges dissented. They concluded that Congress did not intend that LSD carrier mediums, such as blotter paper, should be considered a "mixture or substance" for purposes of determining the weight of LSD for sentencing purposes. Even if Congress intended the weight of the carrier medium to be included in calculating the weight of the LSD, however, the dissenters believed that such a sentencing scheme would offend due process principles because, in their view, it is irrational to make the difference in a defendant's sentence turn on the weight of an inert ingredient. J.A. 63-72 (Cummings, J., dissenting); *id.* at 73-87 (Posner, J., dissenting).

SUMMARY OF ARGUMENT

The courts below correctly held that the sentence for distributing LSD rests on the gross weight of the drug and its carrier medium, not on the net weight of the pure drug, and that a weight-based sentencing scheme for LSD offenses is not irrational.

1. The Anti-Drug Abuse Act of 1986 and the Sentencing Guidelines created a set of graduated penalties that vary according to the weight of the "mixture or substance containing a detectable amount of" LSD, not according to the weight of the pure drug. Congress and the Sentencing Commission adopted a weight-based penalty system in order to punish severely offenders who distribute large quantities of drugs, regardless of their purity. The Act and the Guidelines include LSD within that penalty scheme, and there is no reason to fashion a special exception for LSD that is not found in the text of either the statute or the Guidelines.

LSD-infused blotter paper is a "mixture or substance containing a detectable amount of" the drug, because LSD binds itself to the paper in the application process (and therefore "mixes" with the paper) or because the paper is designed to be ingested along with the drug (and therefore is a "substance" containing LSD). The role of blotter paper in the distribution of LSD does not differ materially from the role played by carriers in the distribution chain in the case of other drugs. Because a dose of LSD is infinitesimal, some carrier is necessary for LSD to be distributed. Blotter paper serves that role: It allows LSD to be sold in an easily concealable, transferable, and ingestible form.

2. The penalty scheme established by the Anti-Drug Abuse Act of 1986 is not unconstitutional. That scheme does not infringe a defendant's "fundamental right to liberty," since a lawfully convicted defendant may be sentenced to any punishment defined by law that is not cruel and unusual. The penalty scheme can be challenged only on the ground that it is irrational, and this one is not.

Congress acted rationally in requiring the courts to include the weight of LSD-infused blotter paper when calculating a defendant's sentence for distributing LSD. The weight of the carrier serves as a rough proxy for the size of the trafficker's criminal enterprise. Moreover, any claim that a defendant's sentence does not correspond to the particular facts of his case could also be lodged against a fixed sentence for distributing LSD, but determinate sentences are clearly constitutional. Finally, the Act and the Sentencing Guidelines allow the courts room to adjust a sentence upward or downward in order to reflect the role a defendant played in the distribution scheme.

Including the weight of an LSD carrier does not render the 1986 Act unconstitutionally vague. The text of the statute gave the defendants fair warning that the weight of the carrier would be counted. It is not necessary that a statute be "definitively construed" in order for it to overcome a claim of unconstitutional vagueness; all that is required is that the defendants have fair notice of how the statute may be read.

ARGUMENT

I. THE ANTI-DRUG ABUSE ACT OF 1986 AND THE SENTENCING GUIDELINES REQUIRE THAT THE COMBINED WEIGHT OF THE LSD AND ITS CARRIER MEDIUM BE USED IN CALCULATING THE TOTAL WEIGHT OF THE DRUG FOR SENTENCING PURPOSES

Trafficking in LSD is prohibited by the federal drug laws, 21 U.S.C. 812 and 841(a), and is severely punished. Distribution of less than one gram of LSD is punishable by up to 20 years' imprisonment, 21 U.S.C. 841(b)(1)(C); trafficking in greater amounts brings even stiffer penalties. A first offender who distributes one gram or more of a "mixture or substance containing a detectable amount of" LSD must be sentenced to a five-year term of imprisonment and may be incarcerated for up to 40 years. 21 U.S.C. 841(b)(1)(B)(v). A first offender who distributes ten or more grams must receive a sentence of ten years' imprisonment and may be confined for life. 21 U.S.C. 841(b)(1)(A)(v).

The question in this case involves the appropriate method for calculating a defendant's sentence under Section 841(b)(1) for an LSD violation. The district court based its sentence calculation on the weight of both the pure LSD and the blotter paper that

served as a carrier medium for the drug. The defendants maintain that Congress and the Sentencing Commission did not intend the weight of an LSD carrier to be used in calculating the weight of the drug for sentencing purposes. That is so, they contend, even though a carrier medium such as blotter paper is ordinarily used to distribute LSD, and even though that carrier medium can be and ordinarily is ingested along with the drug.

Six courts of appeals have considered the defendant's argument, and every one has rejected it. See *United States* v. *Larsen*, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509; *United States* v. *Elrod*, 893 F.2d 60 (6th Cir.), cert. denied, 111 S. Ct. 104 (1990); *United States* v. *Bishop*, 894 F.2d 981, 985-987 (8th Cir. 1990); *United States* v. *Daly*, 883 F.2d 313, 316-318 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); *United States* v. *Rose*, 881 F.2d 386 (7th Cir. 1989); *United States* v. *Taylor*, 868 F.2d 125, 127-128 (5th Cir. 1989).[6] Those courts have determined that the defendants' argument is inconsistent with the text and purpose of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, and with the Sentencing Guidelines. For the reasons given below, those courts are correct.

A. Sentences For LSD Offenses Are Based On The Gross Weight Of The Drug And Its Carrier Medium, Not The Net Weight Of The Pure Drug

1. The graduated set of penalties for LSD offenses found in the Anti-Drug Abuse Act of 1986 makes the defendant's sentence turn on the weight of the "mix-

---

[6] One district court has ruled to the contrary. *United States* v. *Healy*, 729 F. Supp. 140 (D.D.C. 1990). The government has taken an appeal from that ruling.

ture or substance containing a detectable amount" of LSD that a person distributes, not the weight of the pure drug. Thus, the statute makes it quite clear that if the drug and the carrier medium together can be considered a "mixture or substance," it is the gross weight of the drug and the carrier medium that determines the applicable penalty, not the weight of the pure drug that may be contained in the carrier medium.

Other provisions of the 1986 Act make clear that Congress knew how to distinguish between the weight of a pure drug and the weight of a "mixture or substance" containing some quantity of the drug, and that the reference to "mixture or substance" was not simply a careless way of referring to the amount of the pure drug distributed. With respect to both phencyclidine (PCP) and methamphetamine, the Act in several places imposes penalties based either on an amount of the pure drug or a larger amount of a "mixture or substance" containing the drug. See 21 U.S.C. 841(b)(1)(A)(iv), (B)(iv), (B)(viii). PCP and methamphetamine are the only drugs for which the Act provides a penalty gauged according to the weight of the pure drug. The reference to the pure weight of those drugs, and the use of a larger amount of the "mixture or substance" containing those drugs as an alternative basis for sentencing for PCP and methamphetamine crimes, both indicate that where Congress referred to the weight of a "mixture or substance" containing a drug, it meant to trigger the statutory penalty scheme by reference to the combined weight of the drug and its carrier medium.

2. The genesis of the "mixture or substance" clause in the Anti-Drug Abuse Act of 1986 reinforces the plain meaning of the text. The Comprehensive

Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Tit. II, 84 Stat. 1260-1261, established penalties for the distribution of controlled substances according to the type of drug involved, not its weight. The distribution of Schedule I or II controlled substances carried a heavier punishment than the distribution of other drugs. See 21 U.S.C. 841(b)(1)-(3) (1982); H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 4-5, 10-11, 46-51 (1970); S. Rep. No. 613, 91st Cong., 1st Sess. 24-26 (1969). The distribution of LSD, a Schedule I controlled substance, was punishable by a maximum of five years' confinement. 21 U.S.C. 841(b)(1)(B) (1982).

The Controlled Substances Penalties Amendments Act of 1984, enacted as Chapter V of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2068, modified the penalty system by introducing the principle that the sentence should vary according to the weight of the controlled substance that is chargeable to the defendant. In the case of LSD, the 1984 Act imposed a maximum term of 20 years' imprisonment for the distribution of five or more grams of LSD. 21 U.S.C. 841(b)(1)(A)(iv) (Supp. II 1984). Distribution of lesser amounts of LSD were subject to a maximum term of 15 years' imprisonment. 21 U.S.C. 841(b)(1)(B) (Supp. II 1984). See S. Rep. No. 225, 98th Cong., 1st Sess. 255-259 (1983). In each case, however, the relevant weight was that of pure LSD. *United States* v. *McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

Congress again modified the penalty system for controlled substances in the Narcotics Penalties and Enforcement Act of 1986, Title I of the Anti-Drug Abuse Act of 1986. That Act adopted a so-called "market-oriented approach" to punishing drug traf-

ficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. 1, at 11-12, 17 (1986). To implement that principle, Congress created terms of imprisonment and set mandatory minimum sentences to correspond to the weight of a "mixture or substance containing a detectable amount of" the various Schedule I and II controlled substances, including LSD. 21 U.S.C. 841(b)(1)(A)(i)-(viii) and (B)(i)-(viii).

Chapman maintains that the legislative history of the Anti-Drug Abuse Act of 1986 shows that Congress did not intend to include the weight of the LSD-infused carrier medium. Chapman Br. 21-25. But Chapman does not point to anything in the legislative history of that Act to support that claim. Instead, he relies on a passage in a 1981 Senate Report on a bill that Congress did not enact into law, the proposed Criminal Code Reform Act of 1981 (S. 1630). In that report, the Senate Judiciary Committee proposed amending the federal drug laws to base the penalty for LSD trafficking on the weight of the pure drug. In so doing, the Committee noted that five grams of LSD is "approximately 100,000 times the average user dosage." S. Rep. No. 307, 97th Cong., 1st Sess. 868 (1981). That estimate is correct, Chapman argues, only if the weight of LSD carriers is not counted. Chapman Br. 23. Chapman therefore maintains that Congress must have assumed that the mandatory minimum sentencing provisions of the 1986 Act would not be triggered by "low level dealers" like himself. Chapman Br. 24.

That argument is unpersuasive. The cited passage came in the midst of a discussion about amending the penalty scheme in the 1970 Act in order to correlate

the penalty with the amount of pure drug distributed. S. Rep. No. 307, *supra*, at 867-869. Congress adopted a "pure drug" sentencing scheme when it subsequently enacted the Controlled Substances Penalties Amendments Act of 1984. See 21 U.S.C 841(b)(1)(Supp. II 1984); S. Rep. No. 225, *supra*, at 255-259. But the Anti-Drug Abuse Act of 1986 rejected the principle that a defendant's punishment should be gauged by the quantity of the pure drug involved. Since the 1986 Act modified the 1984 statute to make a "mixture or substance containing a detectable amount of" LSD the relevant quantity, there is no reason to assume that Congress continued to believe that sentences for LSD offenses should be graduated according to the amount of pure LSD sold, as had been the case under the 1984 statute.[7]

3. In formulating the scheme for sentencing LSD offenders, the Sentencing Commission followed Congress's lead and graduated sentences according to the weight of the "mixture or substance" containing the controlled substance, rather than the actual weight of the controlled substance itself. The Commission devised a Drug Quantity Table to set the offense levels for different quantities of drugs. See Guidelines § 2D1.1(c). That Table incorporates the "mixture or substance" formulation from the Anti-Drug Abuse Act of 1986 to calculate the weight of a drug for the various base offense levels under that Table. See United States Sentencing Comm'n, *Guidelines*

[7] Chapman cites *United States* v. *McGeehan*, 824 F.2d at 681, to support his argument, Chapman Br. 25, but that case involved the 1984 statute, not the 1986 Act. In *United States* v. *Bishop*, 894 F.2d at 985-987, the Eighth Circuit rejected Chapman's submission.

Manual 2.47 n.* (1990).[8] See also *id.* at 2.48, Application Note 1 ("'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841."); *id.* at 2.49, Application Note 10 ("The Commission has used the sentences provided in, and the equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences."); *id.* at 2.53 (distinguishing between "the weight of the actual controlled substance, and * * * the weight of the mixture or substance containing the controlled substance").

The Sentencing Guidelines also contain a Conversion Table for use in determining the defendant's

[8] The footnote accompanying the Drug Quantity Table in Sentencing Guidelines § 2D1.1 states:

> Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined for the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater.

Guidelines Manual Drug Quantity Table 2.47 n.*.

The version of this footnote in the original *Guidelines Manual* § 2D1.1(a)(3) Drug Quantity Table 2.39 n.* (1987) referred to a "mixture *of* a compound" (emphasis added), not a "mixture *or* a compound." The use of the term "of" in the original *Guidelines Manual* was obviously a typographical error, since the Commission used the phrase "mixture *or* compound" in the following clause of the same footnote (emphasis added), and since the Anti-Drug Abuse Act, on which that Sentencing Guideline provision is modeled, is framed in the disjunctive. The 1990 version of the Guidelines has corrected the error.

base offense level in cases where the number of doses, but not the weight of a drug, is known. The Sentencing Commission specifically noted that, in connection with LSD, "the weight per unit shown is the weight of the actual controlled substance, *and not generally the weight of the mixture or substance containing the controlled substance.* Therefore, use of this table provides a very conversative estimate of the total weight." *Id.* at 2.53 (emphasis added). See App., *infra*, 2a. As the court below recognized, J.A. 48-49, that Table shows that the Sentencing Commission believes that the known weight of an LSD carrier must be included as part of the weight of the "mixture or substance" under the Act and the Guidelines.

Accordingly, it is beyond serious dispute that both Congress and the Sentencing Commission have required that courts fashion sentences for LSD offenders based on the weight of the drug and the carrier medium involved, rather than the weight of the pure drug itself. In light of the statutory language and the corresponding approach employed in the Sentencing Guidelines, it is not surprising that the courts of appeals have consistently rejected the argument that a sentence should rest on the net weight of the pure controlled substance, as Chapman and Marshall suggest.[9]

[9] *E.g., United States* v. *Dorsey*, Nos. 90-1214 *et al.* (8th Cir. Dec. 24, 1990), slip op. 6-9 & n.5 (PCP); *United States* v. *Touby*, 909 F.2d 759, 772-773 (3d Cir. 1990) (4-methylaminorex ("Euphoria")), cert. granted, No. 90-6282; *United States* v. *McKeever*, 906 F.2d 129, 133 (5th Cir. 1990) (phenylacetone), cert. denied, No. 90-5917 (Jan. 22, 1991); *United States* v. *Mueller*, 902 F.2d 336, 345 (5th Cir. 1990) (methamphetamine); *United States* v. *Skelton*, 901 F.2d 1204 (4th Cir. 1990) (PCPy, an analog of PCP); *United States* v. *Meitinger*, 901 F.2d 27, 29 (4th Cir.) (dilaudid), cert. denied, 111 S. Ct. 519

B. LSD-infused Blotter Paper Constitutes "A Mixture Or Substance Containing A Detectable Amount" Of LSD

Neither the 1986 Act nor the Sentencing Guidelines define the terms "mixture" and "substance." Absent some clear indication to the contrary, those terms therefore must be given their ordinary meaning. See *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990); *Russello* v *United States*, 464 U.S. 16, 21 (1983). A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence," while a "substance" includes "a distinguishable kind of physical matter." *Webster's Third New International Dictionary* 1449, 2279 (1986). Those definitions are clearly broad enough to include LSD-infused blotter paper as a "mixture or substance containing a detectable amount of" LSD.

LSD is applied to blotter paper in a solvent, such as alcohol, which is absorbed into the paper and ultimately evaporates. When the solvent evaporates, the LSD is left behind in a form that can be said to

---

(1990); *United States* v. *Elrod*, 898 F.2d at 62-63 (LSD); *United States* v. *Bayerle*, 898 F.2d 28 (4th Cir.) (dilaudid and dolaphine (methadone)), cert. denied, 111 S. Ct. 65 (1990); *United States* v. *Butler*, 895 F.2d 1016 (5th Cir. 1989) (statute and Sentencing Guidelines required a sentence based on total weight of 38½-pound mixture that contained only small amount of methamphetamine), cert. denied, 111 S. Ct. 82 (1990); *United States* v. *Bishop*, 894 F.2d at 985-986 (LSD); *United States* v. *Baker*, 883 F.2d 13, 15 (5th Cir.) (methamphetamine), cert. denied, 110 S. Ct. 517 (1989); *United States* v. *Rojas*, 868 F.2d 1409, 1409-1410 (5th Cir. 1989) (cocaine).

"mix" with the paper. J.A. 44-45; Tr. 48. Alternatively, LSD-infused blotter paper can be viewed as a "substance" that "contain[s]" the LSD, since the entire unit in effect constitutes a form of LSD that is convenient to distribute and ingest. *United States* v. *Daly*, 883 F.2d at 317; *United States* v. *Bishop*, 704 F. Supp. at 911. Accordingly, whether the LSD-infused blotter paper is viewed as a "mixture," as the Seventh Circuit concluded, J.A. 44-45, or a "substance," as the Fourth and Eighth Circuits held, *United States* v. *Bishop*, 894 F.2d at 986; *United States* v. *Daly*, 883 F.2d at 317, the entire unit is a "mixture or substance containing a detectable amount" of LSD within the meaning of the statute and the Sentencing Guidelines, and the weight of the carrier medium must therefore be added to the weight of the pure drug to determine the appropriate penalty.

Chapman argues (Br. 16-17) that it is wrong to treat blotter paper as a "cutting agent," because the paper does not increase the number of doses that can be distributed. In fact, however, the use of blotter paper as a carrier medium has exactly that effect. It makes it possible to divide a small volume of a highly potent drug into a large number of easily separable units containing a single dose—something that could not easily be done by distributing the drug in pure form, straight from the bottle.

Pure LSD is extremely potent; only a tiny amount is necessary to achieve the hallucinogenic effect that users seek. "Single dosage" units of LSD are so small that the liquid chemical must be added to some carrier for the drug to be distributed at the street level.[10] In order for it to be marketable, therefore,

---

[10] "To give some idea of the small bulk involved, it would only require 3 ozs of the drug to provide effective doses for

pure liquid or solid LSD must be converted into an easily carried, dispensed, and ingested form.

Blotter paper fills that role perfectly. *United States* v. *Bishop*, 894 F.2d at 985; *United States* v. *Rose*, 881 F.2d at 388; *United States* v. *Marshall*, 706 F. Supp. at 652; T. Cox, *supra*, at 308-309. Because it is so well suited to carrying very small quantities of LSD in a readily distributable, concealable, and ingestible form, blotter paper serves a vital function in the wholesale and retail distribution of LSD. See *United States* v. *Bishop*, 894 F.2d at 985 ("The blotter paper serves the purpose of making the LSD ready for retail sale and ingestion by the user."). The Fourth Circuit was therefore correct in noting that "LSD 'carriers' serve precisely the same *function* as the more familiar 'cutting agents' which are typically used with other drugs," since carriers enable a dealer to distribute the drug in large quantities in an easily ingestible form. *United States* v. *Daly*, 883 F.2d at 318. "What is important is that the blotter paper itself can be and is ingested with the drug much the same as any dilutant or cutting agent would be ingested." *Ibid.* (quoting *United States* v. *Bishop*, 704 F. Supp. at 911). See also *United States* v. *Elrod*, 898 F.2d at 62; *United States* v. *Bishop*, 894 F.2d at 985. Treating blotter paper as a "mixture or substance containing a detectable amount of" LSD is consistent with the way that carrier mediums and cutting agents are treated in the case of other controlled substances.

Congress made clear in the 1986 Act that it intended the penalties to be graduated according to the

---

every man[,] woman, and child in a city the size of Glasgow!" B. Wells, *Psychedelic Drugs* 47 (1973).

weight of the drugs in the form in which they were found—cut or uncut, pure or impure, ready for wholesaling, or ready for distribution at the retail level. See H.R. Rep. No. 845, *supra*, Pt. 1, at 12 (quantities of drugs triggering the new threshold penalties "are not necessarily quantities of pure substance"), 17-18. For LSD, that means including the weight of a carrier medium such as blotter paper if the drug is found in a state ready for retail distribution, as it was in this case.

Chapman argues that the "mixture or substance" clause cannot be given its dictionary meaning because, if it is, the clause could be read to include carriers like "a sugar cube, a heavy jar, or a Buick." Chapman Br. 12. For that reason, he argues, the "mixture or substance" clause is ambiguous. That argument is unpersuasive. To paraphrase *United States* v. *Monsanto*, 109 S. Ct. 2657, 2663 (1989), the fact that the Act reaches a carrier like a sugar cube " 'does not demonstrate ambiguity' in the statute; 'It demonstrates breadth.' " At the same time, the Act does not reach "substances" like bottles and cars because they are not ingested along with the drug. When LSD is carried in a jar, the LSD and the jar are not a "mixture or substance" any more than cocaine and tinfoil are a "mixture or substance" when cocaine is carried in a tinfoil packet. The court of appeals therefore correctly recognized that one gram of LSD in a glass bottle that weighs 50 grams is just one gram of LSD, not 51 grams of a "mixture or substance" containing LSD. J.A. 44.

C. Neither The Rule Of Lenity Nor The Canon Of Construing Laws To Avoid Unconstitutionality Applies In This Case

1. Chapman invokes the rule of lenity, claiming that since it is unclear whether a carrier medium is a "mixture or substance" containing a detectable amount of LSD, the Act should be construed to omit any reliance on the carrier medium when determining the total weight of LSD-infused blotter paper. But the rule of lenity is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)). Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). See also, *e.g.*, *Moskal* v. *United States*, 111 S. Ct. at 465; *Russello* v. *United States*, 464 U.S. at 29; *United States* v. *Turkette*, 452 U.S. 576, 587-588 n.10 (1981).

The statute and the Sentencing Guidelines direct that the weight of any ingestible LSD carrier medium containing a detectable amount of LSD be included for sentencing purposes; the legislative history of the Act does not undermine that conclusion in any way; and a straightforward reading of the statute does not produce a result "so 'absurd or glaringly unjust,'" *United States* v. *Rodgers*, 466 U.S. 475,

484 (1984) (quoting *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932)), as to raise a "reasonable doubt" about Congress's intent, *Moskal* v. *United States*, 111 S. Ct. at 465. Under these circumstances, there is no occasion to resort to the rule of lenity.

In an effort to show that the "mixture or substance" clause is ambiguous, Chapman relies on the fact that one district court has held that the clause excludes LSD-infused blotter paper. Chapman Br. 18, citing *United States* v. *Healy*, 729 F. Supp. at 142-144. This Court, however, recently rejected precisely that type of claim in *Moskal* v. *United States*, *supra*. In *Moskal*, the Court made clear that a law cannot be deemed "ambiguous" simply because there is "a division of judicial authority" over its proper interpretation; otherwise, "one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one." 111 S. Ct. at 465. That one district court has disagreed with six circuits over the interpretation of Section 841 therefore hardly means that the law is ambiguous; indeed, the unanimity of the courts of appeals on the subject tends to suggest just the opposite.

As other support for his argument, Chapman claims that "[s]ome members of Congress agree that the use of the phrase 'mixture or substance containing a detectable amount of LSD' was less than precise." Chapman Br. 18. Chapman relies upon two items: (1) a letter by Sentencing Commission Chairman Wilkins to Senator Biden in which Chairman Wilkins said that Congress might wish to clarify 21 U.S.C. 841 by expressly including or excluding LSD carrier mediums, and (2) two bills introduced by Senators Biden and Kennedy that would have excluded LSD carrier mediums from the "mixture or substance" clause.

In 1989, Senator Biden forwarded to Sentencing Commission Chairman Wilkins a letter written on behalf of Sidney Bishop, the defendant in *United States* v. *Bishop*, *supra*, complaining about the inclusion of carrier mediums in the calculation of sentences for LSD offenses. Chairman Wilkins replied by explaining that the Sentencing Commission had previously solicited public comment on this issue, 54 Fed. Reg. 9136 (1989), and that "[a]fter thorough consideration, it was the Commission's view that the term *mixture* under the guidelines should be defined as having the same meaning as under the Controlled Substances Act." Marshall C.A. App. 164. Chairman Wilkins also stated that "[i]t is indisputable that, in general, under the Anti Drug Abuse Act of 1986, Congress rejected linking punishment levels to drug purity," yet "[w]ith respect to LSD, it was unclear whether Congress intended the carrier to be considered as packaging material, or since it is commonly consumed along with the illicit drug, as a dilutant ingredient in the drug mixture." *Id.* at 165; J.A. 46-47. Chairman Wilkins suggested that Congress may wish to clarify its intent by expressly choosing one approach or the other. Marshall C.A. App. 165; J.A. 47.

Senator Biden thereafter introduced an amendment to the Administration's crime bill, S. 1711, 101st Cong., 1st Sess. (1989), that would have amended the Anti-Drug Abuse Act of 1986 by omitting the weight of an LSD carrier medium. See 135 Cong. Rec. S12,748 (daily ed. Oct. 5, 1989) (prepared statement describing Amendment No. 976). The bill passed by the Senate, however, did not contain Senator Biden's amendment. 135 Cong. Rec. S13,433-S13,469 (daily ed. Oct. 16, 1989). Senator Kennedy introduced a different bill that also would

have excluded carrier mediums, see 136 Cong. Rec. S7069-S7070 (daily ed. May 24, 1990) (Amendment No. 1716 to S. 1970), but that amendment likewise did not become law.

All this is ultimately of little weight. As this Court has stated time and again, subsequent legislative history is a treacherous guide to congressional intent, especially if it takes the form of amendments proposed by individual legislators. See *Pierce* v *Underwood*, 487 U.S. 552, 566-567 (1988); *Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 733-734 & n.14 (1977); *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring in part). As the court of appeals recognized, the materials Chapman cites reflect only an "ongoing debate[]," and not "the views of [a subsequent] Congress." J.A. 46. In any event, the fact that clarifying legislation has been proposed does not mean that the statutory text in question provides no guidance and must be construed in favor of the defendant. Congress often proposes and adopts clarifying amendments to statutes to resolve questions of statutory construction without the need for litigation. But Congress's efforts to save the courts from sometimes difficult exercises in statutory construction should not be parlayed into a maxim that the rule of lenity must be applied any time Congress—or some Members of Congress—have proposed clarifying legislation of some kind.

The same principle applies to the observations of Chairman Wilkins regarding the "mixture or substance" clause. In his letter to Senator Biden, Chairman Wilkins acknowledged that it was open to debate whether Congress intended to include LSD carrier mediums within the "mixture or substance" clause of Section 841(b)(1). For that reason, he

suggested that Congress might wish to settle the matter by legislation. But Chairman Wilkins' reference to the failure of the statute to resolve that issue explicitly does not mean that he, or the Sentencing Commission, regarded the "mixture or substance" clause as insolubly ambiguous as applied to LSD.[11]

2. Chapman invokes the canon initially and most prominently set forth in *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), that the "spirit" of a law should prevail over its "letter" when it appears unlikely that Congress intended the harsh outcome that the language seems to compel. Chapman maintains that the "mixture or substance" clause should not be read in "[a] lockstep" fashion that its text dictates. Chapman Br. 21 n.24; *id.* at 18-21. His appeal to the spiritual dimension of the law scarcely justifies disregarding the plain meaning of statutory text and the Guidelines.

---

[11] Prior to Chairman Wilkins' letter, the Technical Assistance Service of the Sentencing Commission issued an informal commentary entitled *Questions Most Frequently Asked About the Sentencing Guidelines, reprinted in* T. Hutchison & D. Yellen, *Federal Sentencing Law and Practice* Supp. App. 4 (1989). In that commentary, the staff noted that "the Commission has not addressed the issue" whether the weight of "blotter paper or sugar cubes on which LSD or some other controlled substance has been absorbed" should be included in calculating the total weight of the controlled substance. See T. Hutchison & D. Yellen, *supra*, Supp. App. 4, at 141. The staff commentary, however, simply indicates that the Commission sought to ensure that the Guidelines would be construed *in pari materia* with the statute with respect to the "mixture or substance" clause. Thus, the commentary explains that the courts would have to determine whether carriers should be counted in calculating the total weight of a controlled substance. *Ibid.* The courts of appeals have done so, and all agree on the answer.

Because LSD is sold by the dose, not by its weight, Chapman argues that the weight of an LSD carrier should not be counted for sentencing purposes. But "[t]he short answer is that Congress did not write the statute that way." *Russello* v. *United States*, 464 U.S. at 23. Congress rejected a "pure drug" system of sentencing in favor of a system that depends on the combined weight of the drug and its carriers medium or dilutant, regardless of the amount of the pure drug —or the number of doses—that may be contained in a carrier of a particular weight.

Chapman maintains that Congress could not have intended to include the weight of an LSD carrier medium for sentencing purposes, because the carrier will constitute nearly all of the weight of the entire unit and because the weight of the unit will vary greatly depending on the choice of carriers having different weights, such as blotter paper, gelatin, or sugar cubes. Chapman Br. 9-14. But the same point can be made about drugs like heroin and cocaine, as to which Congress clearly intended the dilutant or carrier medium to be included in the weight for sentencing purposes.

In the case of heroin or cocaine, inactive ingredients, or "cutting agents," are combined with the pure drug, and the mixture is then sold as a heavily diluted form of the drug. In some cases, the concentration of the drug in the carrier is very low. *E.g.*, *United States* v. *Buggs*, 904 F.2d 1070 (7th Cir. 1990) (1.2% heroin); *United States* v. *Dorsey*, 591 F.2d 922 (D.C. Cir. 1979) (2% heroin); *United States* v. *Smith*, 601 F.2d 972 (8th Cir.) (2.7% and 8.5% heroin quantities), cert. denied, 444 U.S. 899 (1979); J. Platt, *Heroin Addiction: Theory, Research, and Treatment* 48-50 (2d ed. 1986) (2-3% heroin). Those concentrations are somewhat higher, but still of the

same order of magnitude as the concentration of the LSD in the blotter paper sold by Chapman (0.877%) and Marshall (0.59%). J.A. 41 & n.1.

Moreover, as in the case of LSD when different carrier mediums are used, the level of purity of heroin and cocaine on the market varies greatly. *E.g.*, *United States* v. *Monu*, 782 F.2d 1209 (4th Cir. 1986) (14-18% heroin); *United States* v. *Mendes*, 912 F.2d 434 (10th Cir. 1990) (47% heroin); *United States* v. *Beissel*, 901 F.2d 1467 (8th Cir. 1990) (77% cocaine); *United States* v. *Williams*, 894 F.2d 208 (6th Cir. 1990) (87% cocaine); Office of Intelligence, DEA, *Domestic Monitor Program* ii (Apr.-June 1990) (purity of retail purchases of heroin ranged from 0.6% to 75.9%); *id.* at 6 (heroin purity in ten selected cities ranged from 3.1% in Baltimore to 41.4% in New York). Of course, decreasing heroin or cocaine purity by adding increasing amounts of a cutting agent can dramatically increase the total weight of the drug, and thus increase the sentencing level under a weight-based sentencing scheme. Yet Chapman does not suggest that Congress did not intend to adopt a weight-based approach in the case of those drugs. Since the effect is similar in the case of LSD, the dilution rate in the case of that drug is not a sufficient reason for disregarding the text of Section 841 with respect to LSD alone.

3. Finally, Chapman argues (Br. 28) that carriers should be excluded from the "mixture or substance" clause based on the maxim that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction. That canon is "quite often useful in close cases, or when statutory language is ambiguous," but it is "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Monsanto*, 109 S. Ct. at 2664

(quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)). That canon comes into play only if there are "fair alternatives" to the supposedly unconstitutional interpretation, *United States* v. *Rumely*, 345 U.S. 41, 45 (1953), or a different construction of a law is "fairly possible," *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). See also *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979); *Swain* v. *Pressley*, 430 U.S. 372, 377-378 & n.11 (1977). But this body of authority is unavailing here; the text of the Act is simply not, for the reasons stated above, insolubly ambiguous, and its application prescribed by the court of appeals is constitutional, for the reasons stated below.

II. CONGRESS ACTED RATIONALLY IN INCLUDING THE WEIGHT OF LSD CARRIER MEDIUMS FOR SENTENCING PURPOSES

A. A Convicted Defendant Does Not Have A "Fundamental Right" To Have The Courts At Sentencing Reassess The Appropriate Penalty For His Crime

Chapman and Marshall maintain that the penalty scheme of the Anti-Drug Abuse Act of 1986 is unconstitutional. They contend that a criminal defendant has a "fundamental right to fair treatment in sentencing," that a sentencing scheme must be subject to "strict scrutiny," and that "a legislative scheme that impairs that right can thus survive only if it is justified by a compelling and substantial government interest." Chapman Br. 29-32; Marshall Br. 83-88.

That contention is unsupportable. This Court has consistently applied a "rational basis" standard of review in assessing the constitutionality of sentencing

provisions.[12] That standard of review follows quite naturally from the general principles describing the operation of the criminal adjudicatory process. Every person has a fundamental right to liberty (and life) in the sense that the government may not punish a person unless and until it proves his guilt beyond a reasonable doubt at a criminal trial in accordance with relevant guarantees. *Bell* v. *Wolfish*, 441 U.S. 520, 535-536 & n.16 (1979). See *United States* v. *Salerno*, 481 U.S. 739, 746-747 (1987). But the corollary to that rule is that if a person has been fairly convicted of a crime, he is eligible for and the government can impose whatever punishment is authorized by statute for his offense, as long as that penalty is not cruel and unusual. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 92 n.8 (1986); *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976).[13] Accordingly, once a defendant has been validly convicted of a crime,

[12] See, *e.g.*, *Stanford* v. *Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion) (dictum); *Dobbert* v. *Florida*, 432 U.S. 282, 301 (1977); *Marshall* v. *United States*, 414 U.S. 417, 421-422 (1974); *McGinnis* v. *Royster*, 410 U.S. 263, 270 (1973); *Leary v. United States*, 395 U.S. 6 (1969); *Turner* v. *United States*, 396 U.S. 398 (1970); *Tot* v. *United States*, 319 U.S. 463 (1943); *Finley* v. *California*, 222 U.S. 28 (1911).

[13] There is no force to Marshall's contention (Br. 89-97) that the Eighth Amendment renders his sentence unlawful. In *Hutto* v. *Davis*, 454 U.S. 370 (1982), this Court held that a 40-year sentence is not excessive for distributing nine ounces of marijuana. Marshall received half that penalty for a more serious crime; Chapman and his cohorts received even lighter sentences. The courts of appeals have routinely upheld comparable sentences for similar conduct and have frequently upheld sentences of life imprisonment without parole for drug trafficking crimes. See App. B, *infra*. The sentences imposed in this case are not unduly harsh by comparison.

the Due Process Clause requires no more than that the statutory scheme under which he is sentenced not be arbitrary or irrational.[14]

B. Including The Weight Of An LSD Carrier Medium Does Not Violate The Due Process Clause By Making The Defendant's Sentence Hinge On An Arbitrary Factor

Congress devised the penalty scheme in the Anti-Drug Abuse Act of 1986 with the goal of severely punishing large-volume drug traffickers. H.R. Rep. No. 845, *supra*, Pt. 1, at 12, 17. The Act's penalty scheme assigns more severe penalties to the distribution of larger quantities of drugs, and therefore serves the purpose of attacking large-scale drug distribution at any level. By measuring the quantity of the drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme, as every court of appeals that has addressed the issue has held.[15]

[14] Chapman's and Marshall's argument fares no better when phrased in equal protection terms, because the equal protection principles they invoke in this context spring entirely from the Due Process Clause, see *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), and their equal protection argument "essentially duplicates" their due process argument. *Jones* v. *United States*, 463 U.S. 354, 362 n.10 (1983).

[15] See *United States* v. *Mendes*, 912 F.2d at 439; *United States* v. *Murphy*, 899 F.2d 714, 717 (8th Cir. 1990); *United States* v. *Bishop*, 894 F.2d at 986-987; *United States* v. *Mendoza*, 876 F.2d 639, 641 (8th Cir. 1989); *United States* v. *Holmes*, 838 F.2d 1175, 1177-1178 (11th Cir.), cert. denied, 486 U.S. 1058 (1988); *United States* v. *Klein*, 860 F.2d 1489,

First, it is typically the case that, up to the point that the market will allow, diluting a drug increases the trafficker's profits and allows him to distribute his wares more widely. Tying the penalty to the amount of the substance in its diluted form is therefore consistent with combatting the evils of wide distribution and large profit. Second, many narcotics prosecutions must be brought without an opportunity to test the drugs. For example, in a conspiracy or attempt case, the drugs may never actually be produced or seized, and it may therefore be impossible to know the purity of the substance that was to be supplied. It is far simpler, in a case in which a defendant agrees to produce a kilogram of cocaine, to charge him with responsibility for selling a kilogram of the drug, without inquiring whether the drug was likely to be substantially diluted when he produced it.

Although tying the penalty to the combined weight of the drug and the carrier medium might be viewed as resulting in lighter sentences for persons at the top of the distribution chain, who often possess drugs in purer form, that is not necessarily so, since the statute and the Sentencing Guidelines contain various measures that work to increase the penalties for high-level traffickers. The Act creates a broad sentencing range for distributing a particular amount of LSD, and the court can sentence the defendant within that range in a manner reflecting his status. Major drug traffickers can be prosecuted for conducting a "continuing criminal enterprise." See 21 U.S.C. 848; *Garrett* v. *United States*, 471 U.S. 773 (1985). Similarly, the Sentencing Guidelines allow a court to sen-

1501 (9th Cir. 1988); *United States* v. *Hoyt*, 879 F.2d 505, 512 (9th Cir. 1989); *United States* v. *Savinovich*, 845 F.2d 834, 839 (9th Cir.), cert. denied, 488 U.S. 943 (1988); *United States* v. *Ramos*, 861 F.2d 228, 231-232 (9th Cir. 1988).

tence a defendant at the higher end of the indicated range, or to depart upward from that range, if the drug sold is "unusually pure" and "indicate[s] a prominent role in the criminal enterprise and proximity to the source of the drugs." *Guidelines Manual* 2.48-2.49. See *United States* v. *Iguaran-Palmar*, No. 89-2143 (1st Cir. Feb. 4, 1991), slip op. 5-6. The Sentencing Guidelines also require the court to increase the defendant's base offense level if he was "an organizer or leader" or a "manager or supervisor" of a criminal enterprise, Sentencing Guidelines § 3B1.1 (a)-(c), if he is a "career offender," *id.* § 4B1.1, or if he makes his living from crime, *id.* § 4B1.3. Accordingly, the penalty scheme is not irrational because, acting alone, the "mixture or substance" clause may result in higher penalties for traffickers who are lower on the distribution chain.

The statute and the Sentencing Guidelines also operate rationally in the case of LSD. Congress could have set the penalty scale based on the weight of the pure drug or the approximate number of doses sold, but having chosen a weight-based approach instead, it was not irrational for Congress to include the weight of the carrier medium for LSD. As in the case of other drugs, the weight of the drug and carrier medium that the trafficker uses to distribute it serves as a rough proxy for the size of the defendant's criminal enterprise.

Chapman and Marshall do not claim that the sentencing scheme devised by Congress and the Sentencing Commission has produced an arbitrary array of sentences. Nor did their motions in the district court contain any such proof.[16] Instead, they chal-

[16] See Defendant Chapman's Motion Challenging Applicability of Mandatory Minimum Sentence and Sentencing Guidelines at Sentencing (Oct. 4, 1989); Memorandum in Support

lenged the Act on its face on the ground that it will inevitably lead to lengthy and arbitrary punishments by including the weight of an LSD carrier. Chapman and Marshall contend that the penalty scheme of the 1986 Act is irrational because LSD is sold by the dose, not by weight. A person who uses blotter paper instead of gelatin to distribute LSD, they argue, commits the same crime, sells the same number of doses and amount of the drug, receives the same profit, inflicts the same societal injury, deserves the same moral blame, and, therefore, should receive the same punishment. Yet a person who uses blotter paper instead of gelatin can receive a more severe sentence, because paper is the heavier of the two mediums. Chapman Br. 29-44; Marshall Br. 66-81, 83-97.

There are several answers to this claim. First, it is the trafficker who selects the carrier for the drug. He therefore has control over the extent to which he is exposed to greater sentences because of his use of a heavier carrier.

Second, while curious hypothetical cases can be imagined, involving very heavy carriers and very little LSD (a single dose on a plate of lasagna), those hypothetical cases are of little value in addressing a claim by persons such as the defendants in this case, who used a standard LSD carrier. See J.A. 61 (noting that blotter paper "seems to be the

---

of Defendant Chapman's Motion Challenging Applicability of Mandatory Minimum Sentence and Sentencing Guidelines at Sentencing (Oct. 4, 1989); Notice of Motion and Motion to Adopt Co-defendants' Sentencing Motions (Oct. 11, 1989); Motion for Order Declaring 21 U.S.C. Sec. 841 Mandatory Minimum Sentence for LSD Violates the Due Process and Equal Protection Clauses of the United States Constitution (Oct. 2, 1989).

norm these days"). No First Amendment concern is remotely implicated here, so neither Chapman nor Marshall has standing to challenge the sentence that a trafficker would receive for using much heavier carriers to distribute LSD. See, *e.g.*, *Osborne* v. *Ohio*, 110 S. Ct. 1691, 1697 & n.8 (1990); *United States* v. *Salerno*, 481 U.S. at 745.

Finally, the same objection could be lodged against a statute that imposed a fixed sentence for distributing any quantity of LSD, in any form, with any carrier. Had Congress enacted such a statute, opting for a pure determinate sentencing system, a person who sold 1 dose of LSD would receive the same punishment as one who sold 10,000 doses. Although such a sentencing scheme would be lacking in flexibility, it would clearly be constitutional. Congress has the power to define criminal punishments and to deny the courts any sentencing discretion. This Court expressly so held in *Ex parte United States*, 242 U.S. 27, 42 (1916), reasoning that "the authority to define and fix the punishment for crime is legislative." As has been noted, "in non-capital cases, the [once] established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes." *Lockett* v. *Ohio*, 438 U.S. 586, 604-605 (1978) (plurality opinion). See also *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989).[17]

---

[17] Determinate sentences were found in the Nation's penal codes during its earliest days, see *United States* v. *Grayson*, 438 U.S. 41, 45-46 (1978); *United States* v. *Pinto*, 875 F.2d 143, 145 (7th Cir. 1989), and some have survived into modern times. See, *e.g.*, 18 U.S.C. 1111 (mandatory life imprisonment under federal first-degree murder statute); 21 U.S.C. 848(b) (mandatory life imprisonment for violation of drug "super-kingpin" statute); 18 U.S.C. 2114 (1982) (flat 25-

The current sentencing scheme for narcotics violations contains elements of both determinate and discretionary sentencing. Like any determinate sentencing scheme, the Anti-Drug Abuse Act of 1986 and the corresponding Sentencing Guidelines may lead to seemingly inequitable results in some cases. But that is not a sufficient reason to hold the sentencing scheme unconstitutional. As the Court explained in *City of Dallas* v. *Stanglin*, 490 U.S. 19, 26-27 (1989) (quoting *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (citations omitted)), "[i]f the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

At the same time, the penalty scheme for the distribution of LSD is not as draconian or inflexible as Chapman and Marshall suggest. The Sentencing Reform Act of 1984 and the Sentencing Guidelines grant the courts the discretion to depart downward from the Guidelines sentencing range in appropriate cases. 18 U.S.C. 3553(b); Sentencing Guidelines § 5K2.0 (Policy Statement). Moreover, the Act and the Guidelines authorize a court under proper circumstances to depart downward even from the sentence imposed by a mandatory minimum sentencing law. If a defendant offers the government substantial assistance and the government moves for a reduction in the defendant's sentence, a district court can reduce a defendant's sentence below a statutory mandatory minimum provision. 18 U.S.C. 3553(e); Sentencing Guidelines § 5K1.1 (Policy Statement). Those provisions can soften the effects of a rigid sentencing scheme. Indeed, that is what happened in this case, where Chapman, Schoenecker, and Brumm all benefited from those departure provisions. The government filed a motion under Sentencing Guidelines § 5K1.1, asking the district court to reduce their sentences below the Guidelines sentencing range, and the court did so. Thus, as illustrated by the sentences imposed in this case, the inclusion of the weight of the carrier medium in calculating the statutory and Guidelines offense level does not necessarily produce results so arbitrary or irrational as to violate the Due Process Clause.

---

year sentence for armed robbery of a postal carrier upheld against due process challenge in, *e.g.*, *United States* v. *Smith*, 602 F.2d 834 (8th Cir.), cert. denied, 444 U.S. 902 (1979), and *Smith* v. *United States*, 284 F.2d 789, 791 (5th Cir. 1960)).

C. Including The Weight Of An LSD Carrier Medium As Part Of The Statutory "Mixture Or Substance" Does Not Render The Statute Unconstitutionally Vague

Marshall maintains that including the weight of an LSD carrier for sentencing purposes renders the statute unconstitutionally vague. Marshall Br. 81-83. That claim clearly lacks merit.

Because Section 841 does not infringe First Amendment freedoms, Marshall's challenge must be evaluated in light of the facts of his case. The relevant issue is whether he had fair notice that he would be subject to sentencing on the basis of the combined weight of the LSD and the carrier medium. *United States* v. *Powell*, 423 U.S. 87, 92 (1985); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). If he did, he cannot complain that the Act could be unconstitutionally vague when applied to others. *Hoffman*

Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

Marshall had such notice. The "mixture or substance" clause is sufficiently clear "to give a person of ordinary intelligence fair notice" that his contemplated conduct is covered by the statute. *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Moreover, in 1987, a year before Marshall's offense, the Eighth Circuit had indicated in *United States* v. *McGeehan*, 824 F.2d at 681, that the Anti-Drug Abuse Act of 1986 required the courts at sentencing to include the weight of an LSD carrier, and no court had held to the contrary. Finally, Marshall does not suggest that in deciding to use blotter paper as a carrier medium, he relied on his belief that any penalty he would suffer would be based only on the weight of the pure LSD that he was distributing, rather than the combined weight of the drug and the paper.[18]

Marshall contends that the statute was impermissibly vague because it had not yet been "definitively construed" when he distributed LSD. Marshall Br. 82. Under that test, however, no statute could ever afford fair notice until it had been construed by this

[18] The district court found that the gross weight of the LSD-infused blotter paper distributed by Marshall was 113.32 grams. 706 F. Supp. at 651. Under the Sentencing Guidelines, the distribution of 100 or more grams of an LSD-infused carrier results in a base offense level of 36. Marshall received a two-level increase to level 38 under Sentencing Guidelines § 3B1.1(c) for being an organizer, leader, manager, or supervisor of the LSD distribution scheme. Marshall also fit into Criminal History Category I. With a total offense level of 38 and a Criminal History Category of I, the Sentencing Guidelines set a range of 235-293 months' imprisonment. *Guidelines Manual* 5.2 Sentencing Table (Oct. 1987); Marshall Presentence Report 14-18 (June 5, 1989).

Court. No decision by this Court supports that conclusion, and *United States* v. *Rodgers*, 466 U.S. at 484, is to the contrary. *Rodgers* held that a defendant had fair notice of the meaning of a statute even though the court of appeals for the circuit in which the charged conduct took place had previously ruled that that conduct was not a crime. Marshall's claim of lack of fair notice falls, *a fortiori*, in light of *Rodgers*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

FEBRUARY 1991

APPENDIX A

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment provides in part that "nor shall any person * * * be deprived of life, liberty, or property without due process of law."

2. The Eighth Amendment provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. 21 U.S.C. 841 provides in relevant part:

(a) Unlawful acts

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; * * *

(b) Penalties

> Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a violation of subsection (a) of this section involving—
>
> * * * * *

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life * * *

(B) In the case of a violation of subsection (a) of this section involving—

* * * * *

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years * * *.

4. United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1 Application Note 9, at 2.48-2.49 (1990), provides as follows:

> Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity (*see* the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are

> often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

5. United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1 Application Note 11, at 2.52-2.53 (1990), provides in part as follows:

> If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (*e.g.*, 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT
(DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

LSD (Lysergic acid diethylamide) *	.05 mg
MDA *	100 mg
Mescaline	500 mg
PCP *	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin *	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin *	10 mg
2, 5-Dimethoxy-4-methylamphetamine (STP, DOM) *	3 mg

* * * * *

* For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

APPENDIX B

1. In the following cases, the courts of appeals upheld sentences to terms of imprisonment for drug trafficking crimes of comparable length to the sentences imposed on Chapman and Marshall. *E.g.*, *United States* v. *Rhodes*, 779 F.2d 1019, 1027-1028 (4th Cir. 1985) (50 and 75 years for operating a Continuing Criminal Enterprise (CCE), 21 U.S.C. 848), cert. denied, 476 U.S. 1182 (1986); *United States* v. *Harrington*, 761 F.2d 1482, 1485-1487 (11th Cir. 1985) (40 years for CCE); *United States* v. *Darby*, 744 F.2d 1508, 1525-1529 (11th Cir. 1984) (60 years for CCE), cert. denied, 471 U.S. 1100 (1985); *United States* v. *Ortiz*, 742 F.2d 712, 717 (2d Cir.) (ten-year sentence for the sale of six glassine envelopes of heroin), cert. denied, 469 U.S. 1075 (1984); *United States* v. *Amend*, 791 F.2d 1120 (4th Cir.) (30 years), cert. denied, 479 U.S. 930 (1986); *Bellavia* v. *Fogg*, 613 F.2d 369 (2d Cir. 1979) (15 years to life for acting as the driver of car that contained cocaine of others); *Carmona* v. *Ward*, 576 F.2d 405, 414-415 (2d Cir. 1978) (maximum sentence of life imprisonment for street sale of a small amount of cocaine), cert. denied, 439 U.S. 1091 (1979); *Salazar* v. *Estelle*, 547 F.2d 1226 (5th Cir. 1977) (45 years for sale of small quantity of heroin); *United States* v. *Fiore*, 467 F.2d 86, 90 (2d Cir. 1972) (20-year sentence without parole for sale of 40.73 grams of heroin), cert. denied, 410 U.S. 984 (1973). Similar sentences have been imposed in other cases. See *United States* v. *Garrett*, 727 F.2d 1003, 1006-1007 (11th Cir. 1984) (40 years for CCE), aff'd on other grounds, 471 U.S. 773 (1985); *United States* v. *Phillips*, 664 F.2d 971, 985 n.2 (5th

Cir. 1981) (64, 53, and 33 years for CCE), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Webster*, 639 F.2d 174, 180 (4th Cir.) (50 years for CCE), cert. denied, 454 U.S. 857 (1981).

2. In the following cases, the courts upheld sentences of life imprisonment without parole for drug trafficking crimes. *E.g.*, *Young* v. *Miller*, 883 F.2d 1276 (6th Cir. 1989), petition for cert. pending, No. 89-6960; *United States* v. *Martorano*, 866 F.2d 62, 69-70 & n.6 (3d Cir. 1989), cert. denied, 110 S. Ct. 1128 (1990); *United States* v. *Aiello*, 864 F.2d 257 (2d Cir. 1988) (life imprisonment without parole plus 140-year consecutive sentence); *Terrebonne* v. *Butler*, 848 F.2d 500 (5th Cir. 1988) (en banc), cert. denied, 489 U.S. 1020 (1989); *United States* v. *Milburn*, 836 F.2d 419, 421-422 (8th Cir.), cert. denied, 487 U.S. 1222 (1988); *United States* v. *McCann*, 835 F.2d 1184, 1187-1190 (6th Cir. 1987), cert. denied, 486 U.S. 1026 (1988); *United States* v. *Stewart*, 820 F.2d 1107 (9th Cir.) (Kennedy, J.) cert. denied, 484 U.S. 867 (1987); *United States* v. *Erwin*, 793 F.2d 656, 668-669 (5th Cir.), cert. denied, 479 U.S. 991 (1986); *United States* v. *Valenzuela*, 646 F.2d 352 (9th Cir. 1980). Similar sentences have been imposed in other cases. See *United States* v. *Gallo*, F.2d 1504, 1508-1509 (6th Cir. 1985); *United States* v. *Thomas*, 757 F.2d 1359 (2d Cir. 1985); *Williams* v. *United States*, 731 F.2d 138 (2d Cir. 1984), cert. denied, 469 U.S. 1188 (1985); *United States* v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20395